Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT WILLIAM SCHNEIDER - PETITIONER

VS. (IN THE MATTER OF ANDREW C. AND NATALIE C.)

CAMILLE AND DAVID CELESTINO - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I.) The county probate bench erred as a matter of law; abused its discretion and denied Robert his constitutional, statutory and procedural rights to an appeal when it failed to serve him with the orders granting the contested adoption of his children.

II.) The state appellate court erred as a matter of law; abused its discretion and denied Robert his constitutional, statutory and procedural rights when it merely remanded the original issue of service back to the trial court.

III.) The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in violation of a mandatory local court rule.

IV.) The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of Ohio Revised Code 3107.12(F).

V.) The county probate bench erred as a matter of law and abused its discretion when it attempted to circumvent Ohio Revised Code 3107.16(B).

VI.) The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of Ohio Revised Code 3107.11(A)(2) and (3).

VII.) The county probate bench's ex-parte circumvention of Ohio Revised Code 3107.11(A) violated Robert's constitutional, statutory and procedural rights to contest the adoption of his children.

VIII.) The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of Ohio Revised Code 3107.12.

IX.) The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of Ohio Revised Code 3107.14(A).

X.) The county probate bench erred as a matter of law, erred procedurally and abused its discretion when it denied all of Robert's requests for findings of fact and conclusions of law.

XI.) The county probate bench abused its discretion and violated Robert's constitutional, statutory and procedural rights to due process when it refused to recuse itself.

XII.) All of the aforecited violations of Ohio statutory and procedural law constitute a cumulative violation of Robert's right to due process under both the due process clauses of the Fourteenth Amendment, United States Constitution, and Bill of Rights #16 of the Constitution of the State of Ohio.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPTIONS BELOW

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix AI to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the Sixth District Court of Appeals, Lucas County, Ohio appears at Appendix AII to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[x] For cases from **state courts**:

The date on which the highest state court decided my case was October 15, 1997. A copy of that decision appears at Appendix AI.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix __.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. A-__.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I.) Constitution of State of Ohio. Bill of Rights #16: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

II.) Ohio Rules of Civil Procedure (O.R.C.): 1. O.R.C. 52; 2. O.R.C. 55; 3. O.R.C. 56 and 4. O.R.C. 60;

5.) Civ. R. 58: Entry of judgment; "Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the Court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall there-upon enter it. A judgment is effective only when filed with the clerk of journalization. Entry of the judgment shall not be delayed for the taxing of costs."

III.) Ohio Revised Code (O.R.C.): 1. O.R.C. 3107.11(A)(2) and (3); 2. O.R.C. 3107.12; 3. O.R.C. 3107.14 and 4. O.R.C. 3107.16(A);

5. O.R.C. 3107.07 Consents not required: "Consent to adoption is not required of any of the following: (A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

6.) O.R.C. 3107.16 Appeals: finality of decree: "(A) Appeals from the probate court are subject to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

STATEMENT OF THE CASE(S)

Camille Alexis Pizza and Robert W. Schneider were married in 1976. Two children were born to them, Andrew Robert Schneider and Natalie Susanne Schneider. The Schneiders divorced in 1988. A bevy of post-divorce actions followed, one of which resulted in the appellate decision, *Schneider v. Schneider* (1989), 61 Ohio App. 3d 164.

Robert never remarried. Camille married David Donald Celestino and on June 19, 1991, they filed their first petition to adopt Andrew and Natalie. Upon Robert's motion, and because Camille's father was Lucas County Prosecutor, the probate judge recused himself. After full trial on the sole issue of the natural father's consent before a "visiting" judge, the Court of Common Pleas, Lucas County, Ohio granted both adoptions. Robert appealed and the Sixth District Court of Appeals reversed. *Celestino v. Schneider* (1992), 84 Ohio App. 3d 192.

On December 14, 1992, the Celestinos initiated their next, and duplicative, petition for adoption. Although Camille's father was still County Prosecutor, the probate judge did not again recuse himself. On October 4, 1993, he issued an Entry Finding [Robert's] Consent Not Necessary. On October 20, 1993, Robert filed his Motion For Vacation Of Prior Entry For Failure To Perfect Valid Filing and his Motion For Vacation Of Prior Entry For Failure To Perfect Service. He filed his Motion For Vacation Of Prior Entry For Failure Of Recusal on October 26, 1993, and his Motion For Vacation Of Prior Entry For Failure To Comply With Statute on November 12, 1993. All four motions were heard on November 23,

1993, and the court, "Upon agreement of the parties" granted Robert's motion for failure to perfect service, thereby rendering the other three motions moot. On January 13, 1994, Robert filed his Motion For Recusal and his Motion For Full Dismissal For Failure To Perfect Valid Filing.

Eleven months later, such motions were scheduled to be heard on January 18, 1995. Both were then denied. On January 24, 1995, Robert filed his first Request For Findings Of Fact And Conclusions Of Law. None were issued. His Motion For Vacation Of Hearing Date For Failure/Lack Of Service On Father was filed on January 26, 1995. His Motion For Reconsideration was filed January 27, 1995. On January 30, 1995, Robert filed his Affidavit of Disqualification of Judge with the Supreme Court of Ohio. It was denied on February 14, 1995. Robert filed his Motion For Reconsideration on February 24, 1995. It was denied on March 1, 1995.

A hearing on the issue of the necessity of the biological father's consent was scheduled was for April 20, 1995. A continuance was granted to the Celestinos until May 2, 1995. Robert's Motion For Summary Judgment And His Memorandum In Support Thereof was filed on April 19, 1995, and denied on April 24, 1995. One day later, on April 25, 1995, the Celestinos' Response To Father's Motion For Summary Judgment was filed. On April 28, 1995, Robert filed his Request For Findings Of Fact And Conclusions Of Law. None were issued.

Hearing was held on May 2, 1995, and by Judgment Entry, file-stamped that same date, the bench ordered: "Testimony taken; evidence adduced. The issue of the consent of the biological Father is hereby considered submitted to the Court and taken under advisement. A best interest hearing is scheduled for Wednesday, May 10, 1995 at 2:00. Parties

present at setting of hearing and given oral notice by Court." That best interest hearing was held on May 10, 1995. Oral Orders were issued from the Bench, but neither Robert nor his counsel ever received a written Entry of those Orders.

Because of such non-receipt, and assuming the Orders had not yet been journalized due to procedural and/or other errors, Robert filed his October 3, 1995 Motion For Partial Vacation Of Prior Judgment Entry And Oral Orders As Moot [because his son, Andrew, had become emancipated on September 30, 1995]. By Judgment Entry, file-stamped October 5, 1995, the court found and ordered:

> "*** the Court finds that items two and three raised by counsel are false in that journalized entries were issued on May 10, 1995. "Accordingly, the Motion is hereby found not well-taken and denied."

Emphasis by Robert. In the interim, and upon her own further inquiry, Robert's counsel was informed by probate staff that he was not entitled to a copy of those May 10th Orders.

Because Robert had never been either notified of, or served with, any journalized May 10, 1995 entry, either personally or by and through his counsel, his right to an appeal had been buried. Therefore, on November 1, 1995, Robert's Motion For Full Vacation Of Prior Judgment Entry And Oral Orders As Moot, was filed. By Judgment Entry, file-stamped that same date, November 1, 1995, same was denied. Father's Request For Findings Of Fact And Conclusions Of Law, filed on November 7, 1995, was denied on November 8, 1995.

On December 1, 1995, Appellant filed his Notice of Appeal, (Court of Appeals of Ohio, Sixth District, Case No.

L95-367), as well as his Memorandum Of Law Filed In Conjunction With His Instant Appeal. On January 6, 1996, Camille Celestino died, making step-father, David Celestino, the sole Appellee.[1]

Probate records were transferred to the appellate court on February 9, 1996. In an effort to draft assignments of error, Robert's counsel attempted to review those records, but was advised that all were sealed, even to such counsel. On February 15 1996, Robert's Motion For Enlargement Of Time To File Appellant's Brief was filed, together with his Motion For Permission To Review Sealed Court Records And To Stay Time For The Mandatory Submission Of His Assignments Of Error And Brief Of Appellant. By Decision and Judgment Entry, file-stamped February 26, 1996, the District Court granted Robert's request, and extended the time for the filing of his brief until March 17, 1996.

On March 6, 1996, Robert's Counsel spent almost two hours reviewing and hand-copying portions of trial transcripts and records. She discovered that an additional, bifurcated, and ex-parte, "final adoption hearing" had been held, and an ex-parte waiver of the twenty day notice mandated by Ohio statute for an adoption had been effectuated. Neither Robert nor his counsel had been noticed of either.

A further Motion For Enlargement Of Time To File

---

1 Shortly after Camille's death, Robert attempted to contact both children so that he could comfort them in their time of grief, but the maternal grandfather, County Prosecutor Anthony Pizza, prevented any access. Since that time, Robert has learned the whereabouts of his emancipated son, but can only surmise where Natalie is residing.

Appellant/Father's Brief as well as Appellant/Father's Motion For Enlargement Of Time To File His Brief For Unprecedented And Extraordinary Circumstances were filed on March 15, 1996, and granted on March 19, 1996. Those Assignments of Error and Brief of Appellant (Court of Appeals, Sixth District Case No. L-95-367) were submitted on April 17, 1995. Appellant's Notice of Additional Authority, citing *State Ex Rel Smith v. Smith* (1996), 75 Ohio St. 3d, was filed on April 26, 1996. On May 10, 1996, Mr. Celestino filed his Motion For Enlargement Of Time To File Appellee's Brief, as granted on May 13, 1996. No brief was filed. Robert waived oral argument.

By Opinion And Judgment Entry, journalized October 11, 1996, the Sixth District Court remanded: "for service by the clerk of notice of the May 10, 1995 judgments as required by Civ. R. 58(B). Thereafter appellant may file a notice of appeal from the May 10, 1995 judgment entries in accordance with App. R. 4." Robert's Motion For Reconsideration, et al., was filed on October 24, 1996, alleging 1.) the Appellate remand for service "allows the trial court an opportunity to correct/erase error(s), which, in fact, and in themselves, establish Appellant's claim for vacation of the contested adoptions" and 2.) inflicted "a further and punitive, financial burden" on Appellant to expend time and costs of yet a third appeal of these same two adoptions. On that same date, October 24, 1996, Robert's counsel was finally served with the pro-forma May 10, 1995 final adoption Orders. The appellate court summarily denied such motion on May 13, 1996. Robert filed his now third Notice Of Appeal, et al., on November 22, 1996. On January 21, 1997, Appellant's Motion For Enlargement Of Time To File Brief, was granted by Order, file-stamped January 22, 1997. Robert's Assignments of Error and Brief of Appellant (Court of Appeals, Sixth District Case No. L-96-373) were submitted on February 18, 1997. No

responsive pleadings were filed. Because of his strong belief that the constitutional, statutory and procedural arguments delineated in his brief were sufficient to sustain his appeal, Robert again waived oral arguments.

By Opinion and Judgment Entry of June 6, 1997, the Sixth District Court of Appeals refuted all eleven of Robert's assignments of error, and fully endorsed/affirmed the granting of both adoptions. None of his constitutional arguments had been addressed. On July 21, 1997, Robert filed his Appellant's Memorandum in Support of Jurisdiction, which was summarily declined by the Supreme Court of Ohio's Entry of October 15, 1997, "as not involving any substantial constitutional question." Appellant's Motion For Reconsideration was mailed to the Supreme Court of Ohio on October 22, 1997, but was not stamped as received until October 29, 1997. Robert now submits this Petition For A Writ of Certiorari so that, hopefully, his constitutional arguments may finally be addressed and redressed.

REASONS FOR GRANTING THE WRIT

The relationship between a parent and his child(ren) is constitutionally protected. *Quilloin v. Walcott* (1978) 98 S. Ct. 549, at 554. The "freedom of personal choice in matters of ...family life is one of the liberties protected by the Due Process Clause of The Fourteenth Amendment." *Cleveland Board of Education v. La Fleur*, (1974), 414 U.S. 632, 639-640. Also see *Stanley v. Illinois* (1972), 405 U.S. 645; *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233 and *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401.

As the Ohio Sixth District Court of Appeals stated in the first case, *Schneider v. Schneider* (1989), 61 Ohio App. 3d 164: "Whenever an individual may be deprived of life, liberty, or property by the state, due process of law is required. Fourteenth Amendment to the United States Constitution", at 171. *Smith, ex rel Smith v. Smith* (1996), 75 Ohio St. 3d 418, enunciated the need for adequate notice and an opportunity to be heard because of "the finality and serious impact of adoption", citing *In re Adoption of Greer* (1994) 70 Ohio State 3d 292, at 298. Strict adherence to statute(s) is mandated. *In re Adoption of Kuhlman* (1994), 99 Ohio App. 3d 44, at 48.

The Ohio Appellate affirmation of the step-parent adoption of both of Robert's children is in direct conflict with prior decisions rendered by that Court, e.g., In re Adoption of Greer (1994), 70 Ohio St., 3d 292; In re Murray (1990), 52 Ohio St. 3d 155; Provident Bank v. Wood (1973), 36 Ohio St. 2d and In State ex rel Smith v. Smith (1996), 75 Ohio St. 3d 418, and is also apposite to adjudications by sister appellate courts: In re Adoption of Jorgensen (1986), 33 App. (3d) 207; In re Adoption of Kessler (1993), 870 App. 3d 317; In re

Adoption of Knipper (1986), 30 App. (3d) 214; In re Adoption of Kuhlman (1994), 99 Ohio App. 3d 44; In re Adoption of Mays (1986), 30 App. (3d) 195 and McClain v. Lyon (1926), 24 App. 279.

Both the trial court and the district court violated Robert's constitutional, statutory and procedural rights to federal and state due process when each circumvented mandatory Ohio adoption statutes. The Supreme Court of Ohio merely rubber-stamped such violative adjudications, without specifically addressing any of Robert's constitutional or statutory arguments. At AI. As Robert asked in his aborted Appellant's Motion For Reconsideration, file-stamped October 29, 1997, what is more constitutionally substantial than the illegal loss of his two children? At AXXIX.

I. The county probate bench erred as a matter of law; abused its discretion and denied Robert his constitutional, statutory and procedural rights to an appeal when it failed to serve him with the orders granting the contested adoption of his children

Ohio Revised Code (hereinafter noted as O.R.C.) 3107.16(A) mandates that "Appeals from the probate court are subject to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.":

> "A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed, or in a civil case, service of the notice of judgment and its entry of service if service is not made on the party within the three day period in Rule 58(B)

of the Ohio Rules of Civil Procedure."

Title II(A) Rule 4(A) of the Ohio Rules of Procedure. Emphasis by Robert. Title XXV, 2505.03(A) states that "every final order, judgment or decree of a court***may be reviewed or appealed by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction."

Form Final Orders Of Adoption were issued without any notice to, or service on, either Robert or his counsel, as a direct result of a bifurcated and additional ex-parte final adoption hearing, again without notice to either, in violation of O.R.C. 3107.11(A)(3). See lower court's Transcript of Proceedings, May 10, 1995 (hereinafter referred to as TRII), at pages 20 and 21 (through line 8), and at Appendix AXXX VI.

In State ex rel Smith v. Smith (1996), 75 Ohio St.3d 418, The Ohio Supreme Court held *per curiam*:

> "Because of the finality and serious impact of adoption, the law accords protections to a natural parent when the adoption of a child is proposed. Among those protections are the right to adequate notice and an opportunity to be heard before any parental rights are terminated. *In re Adoption of Greer* (1994), 70 Ohio St.3d 292, 298, 638 N.E.2d 999, 1003, citing *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S. Ct. 2985, 77 L.Ed. 2d 614."

The contested adoptions were effectuated, and then later buried (by non-service and non-notice), in contravention of Robert's right to an appeal under O.R.C. 3107.11(A)(3); O.R.C. 3107.16(A); the Rules of Appellate Procedure, Title II(A), Rule 4(A) and Title XXV, 2505.03(A), as well as his

underlying and on-going constitutional right to redress through the Courts: "every person *** shall have justice administered without denial or delay." Constitution of the State of Ohio. Bill of Rights #16. Emphasis by Robert. *In re Adoption of Knipper* (1986), 30 Ohio App. (3d) 214, further held that an adoption decree, defective because it violated a biological parent's due process rights, could be vacated more than four years after its journalization under Ohio Civ.R. 60(B)(5).

The district court merely mooted Robert's aforecited arguments "in light of" its "subsequent remands for service of notice." Such remand did not, and cannot, erase the county court's original statutory denial and ensuing delay. Therefore, the contested adoptions are null and void and should be vacated, *Knipper, supra.* Neither the appellate court nor the Supreme Court of Ohio ruled directly on, or even addressed, any of Robert's constitutional, statutory or procedural arguments. See again AI and AII.

II. The state appellate court erred as a matter of law; abused its discretion and denied Robert his constitutional, statutory and procedural rights when it merely remanded the original issue of service back to the trial court.

O.R.C. 3107.11(A) mandates service and notice on "a person whose consent to the adoption is required." Robert was, and is, such "a person". Further, *Smith, supra* demands adequate notice/service, and *Knipper, supra,* upholds the vacation of an adoption decree when a parent's due process right to notice/service are violated (in that particular case, some four years after the original decree was entered).

By its Opinion And Judgment Entry, journalized October 11, 1996, the Sixth District Court of Appeals (Case

No. L-95-367) remanded back to the probate court, pursuant to Ohio Civil Rule 58(A)(B) and App. Rule 4(A). However, both such rules are procedural, not remedial tools for the correction of a lower court's blatant disregard for, and/or violation of, statutory law. As enunciated by the district court in its subject Opinion, "Civil Rule 58(A) provides that a judgment is only effective when entered upon the journal by the clerk. Civil Rule 58(B) provides that when a court signs a judgment 'it shall endorse thereon a direction to the clerk' to serve all parties with notice of 1.) the judgment and 2) the date of its entry upon the journal." Emphasis by Robert. That Court went on to admit that "1.) the judge did not endorse on any of them a direction to the clerk to serve the parties; 2.) the clerk did not serve anyone with notice of the judgments and the date they were entered on the journal." Emphasis by Robert.

Because the probate bench did not comply with either the controlling statutory mandates for notice and service or 58(A)(B), the two adoptions should have been vacated as a matter of law. *Knipper, supra.* Such a remand is also wholly violate of Robert's due process rights. Fourteenth Amendment, Constitution of the United States; Bill of Rights #16, Constitution of the State of Ohio. Where statutory language clearly expresses...intent, that language will not be construed otherwise by the courts. *Provident Bank v. Wood* (1973), 36 Ohio St.2d. Under the aforecited statutes, *Knipper, supra*, and all cases cited, the trial court's failure to legally notify and/or serve Robert renders the subject adoptions void, demanding a vacation thereof - not a mere remand.

III. The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in violation of a mandatory local court rule

Lucas County Court of Common Pleas Local Probate Court Rule 25.1 states: "No adoption shall be finalized until Court costs are paid in full." [by those filing the Petition]. Emphasis by Robert. See AXXIV.. On October 31, 1995, the trial judge sent a letter to Robert's counsel stating that the total court costs for both adoption cases (the original and reversed AD91-0098, *Celestino v. Schneider, supra*, and the next appealed Ohio Sixth District Court Case No. L-95-367) were $324.80, and that such counsel should "remit this amount to the Lucas County Probate Court as soon as possible." See AXL.

By responsive letter Robert's counsel queried:

> "***please review the above-cited cases and advise how and why these costs are so belatedly being brought to our attention***
>
> "***Local Rule #25.1 specifically states that "no adoption shall be finalized until court costs are paid in full." Despite the fact that neither Mr. Schneider nor I, as his counsel of record, even received a copy of the requested May 10th Judgment Entry, issued by Judge Puffenberger, it is our understanding that such Entry did finalize the above-cited latter case."

See AXLII.

The contested Final Orders Of Adoption forms, file-stamped May 10, 1995, had the following already-printed statement deleted by typewriter: "The Court finds further that Robert filed herein his account for disbursements, which report has been reviewed and has been approved." See AXLIV and AXLV. It is apparent therefrom, and the Judge's aforecited

letter, that court costs were not paid prior to the lower court's Orders granting the contested adoption(s), in either appealed case (Sixth District Court of Appeals Case Nos. L-95-367 and L-96-373) or the prior reversed adoption (*Celestino v. Schneider, supra*). The district court made no comment on the probate bench's violation of its own court rule, other than that Robert, admittedly, had no access to the court's cost department records. No further ruling was offered. Accordingly, the adoptions of Robert's children were granted in violation of the Court's own Rule #25.1, and the appellate court's remand back for service (Case No. L-95-367) cannot, and does not correct, such original violation. For that reason alone, separate and apart from any other arguments, the contested adoptions are null and void.

IV. The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of O.R.C. 3107.12(F)

O.R.C. 3107.12(F) states: "Upon order of the court, the costs of the investigation and other proceedings shall be paid by the Petitioner***" Emphasis by Robert. Adoption proceedings are wholly statutory, and statutes must be clearly followed to afford jurisdiction to grant a decree of adoption. *McClain v. Lyon* (1926), 24 Ohio App. 279. Even more importantly, because the fundamental right to raise a child is terminated by an adoption, applicable statutes must be strictly construed so as to protect parental rights. *In re Adoption of Kessler* (1993), 870 App. 3d 317, and *In re Murray* (1990), 52 Ohio St. 3d 155; *Quilloin, supra, Greer, supra, Lehr, supra,* and *Smith, supra.* The appellate court's remand back for service (Sixth District Court of Appeals Case No. L-95-367)

cannot, and does not, vacate a statutory violation.

V. The county probate bench erred as a matter of law and abused its discretion when it attempted to circumvent O.R.C. 3107.16(B)

> O.R.C. 3107.16(B) states: "upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the Petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice***"

Following an ex-parte, additional and bifurcated final/best interests hearing, the probate bench issued its contested Final Orders Of Adoption (Without Interlocutory Order) on May 10, 1995. Neither Robert nor his counsel were notified of that ex-parte hearing, in direct contravention of O.R.C. 3107.11(A)(3). Nor were they notified of, or served with, a copy of such Final Orders. Counsel only accidentally learned thereof following the filing of Robert's Motion For Partial Vacation Of Prior Judgment Entry And Oral Order As Moot on October 3, 1995, and the resultant Judgment Entry, file-stamped October 5, 1995, which stated that "journalized entries were issued on May 10, 1995." Within just another seven months Robert would have lost his right to an appeal under O.R.C. 3107.16(B).

"Whenever an individual may be deprived of life, liberty, or property by the state, due process of law is required. Fourteenth Amendment to The United States Constitution", *Schneider, supra,* at 171. *Quilloin, supra, La Fleur, supra, Stanley v. Illinois, and Yoder supra.* The termination of a natural parent's right to object to an adoption of his child is a very serious matter, requiring strict adherence to controlling

statute. *In Re Adoption of Kuhlman* (1994), 99 Ohio App. 3d 44, at 48. Such ex-parte attempt to circumvent O.R.C. 3107.16(B) violated Robert's constitutional, statutory and procedural rights to an appeal. Constitution of State of Ohio, Bill of Rights #16, *Greer, supra, Kessler, supra, Lehr, supra, McClain, supra, Murray, supra, Smith, supra.*

VI. The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of O.R.C. 3107.11(A)(2) and (3)

O.R.C. 3107.11 states:

> "(A) After the filing of a petition to adopt an adult or a minor***. At least twenty days before the date of hearing, notice of the filing of the time and place of hearing shall be given by the court to all of the following:***
>
> (2) Any court, agency, or person whose consent to the adoption is required by this chapter, but who has not consented;
>
> (3) A person whose consent is dispensed with upon any ground mentioned in divisions (A), (E), (F), and (G) of section 3107.07 of the Revised Code, but who has not consented."

Emphasis by Robert. Robert's consent had never been

dispensed with by written Judgment Entry, nor had he ever consented to the adoptions. Accordingly, the probate bench's Judgment Entry on May 2, 1995 that the best interest hearing be held on May 10, 1995, just eight (8) days thereafter, as well as its ex-parte ("resumption of") hearing later on May 10, 1995, without service or notice to either Robert or his counsel both clearly violate O.R.C. 3107.11(A)(2) and (3).

In re Adoption of Jorgensen (1986), 33 Ohio App. (3d) 207, held that a finding that the consent of a natural parent is not required for an adoption under R.C. 3107.07(A) does not itself constitute consent, and exclusion of a natural parent from the final hearing on best interest mandates that an adoption under such circumstances be reversed. The Sixth District Court of Appeals (Case No. L-95-367), remand cannot, and does not, vacate such original statutory violation. *Quilloin, supra, La Fleur, supra, Greer supra, Kessler, supra, Kuhlman, supra, Lehr, supra, Murray, supra, Smith, supra.*

The district court relied on the fact that Robert's counsel was present and participated in the scheduling of the May 10th proceeding. However, at that time, such counsel could not know of, nor until much later did she learn of, the bench's ex-parte waiver of time. She was also, obviously, unaware that the Court would reconvene later that same day, without any notice to her or Robert, and "finalize" the adoptions by an ex-parte/bifurcated means. The fact that the bench commented, at the onset of such additional ex-parte/bifurcated hearing, that "Ms. Griffin has departed" was only a statement of fact, because she had left the morning May 10, 1995 hearing with the full belief that such hearing had been completed, and she was not instructed/notified otherwise by anyone. Again, the Ohio appellate court made no attendant constitutional, statutory or procedural findings or rulings.

VII. The county probate bench's ex-parte circumvention of O.R.C. 3107.11(A) violated Robert's constitutional, statutory and procedural rights to contest the adoption of his children.

Again, O.R.C. 3107.11(A)(2) and (3) specifically mandate that Robert had to be given twenty days notice prior to both final best interest hearings - the noticed hearing and the ex-parte "resumption." Instead, on May 4th, two (2) days after it scheduled the final best interests hearing for May 10, 1995, the probate bench faxed a request for waiver of that twenty day notice to the Ohio Department Of Human Services, which was granted on May 9, 1996, just one day prior to both final best interest hearings. See TRII, at 20 (1-24). Also at AXXXVII. Neither Robert, nor his counsel were advised/notified of such ex-parte request. Because both the noticed-morning May 10th best interest hearing and the ex-parte/bifurcated afternoon May 10th best interest hearing, as well as the ex-parte twenty-day waiver, were in violation of specific statutory requirements and constitutional rights to due process, those May 10, 1995 adoptions are null and void. *Quilloin, supra, La Fleur, supra, Yoder, supra, Greer, supra, Jorgensen, supra, Kessler, supra, Knipper, supra, Kuhlman, supra, McClain, supra, Lehr, supra, Murray, supra, Smith, supra.*

While admitting that "Robert did not receive twenty days notice of the hearing", the district court summarily dismissed his O.R.C. 3107.11(A)(2)(3) argument because "counsel did not object to the May 10 date or otherwise call the matter to the Court's attention", even though she could have had no knowledge, as yet, of the probate bench's later request for such waiver. Again, the Court made no constitutional, statutory or procedural analyses of the trial court's ex-parte waiver request/action.

VIII. The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of O.R.C. 3107.12

O.R.C. 3107.12 mandates an investigation and validation by a court-appointed investigator as a pre-requisite for the granting of any adoption. The Celestinos' Exhibit, Composite B, dated May 10, 1995, purports to be such a validation. It consists of four Reports on Proposed Adoption. Two such reports are for Andrew, file-stamped September 4, 1991 and November 17, 1993. Both were signed/authorized by the investigator, Nadine Danford, LSW, on September 4, 1991 and November 6, 1993, respectively. However, neither of the other two reports for Natalie, although file-stamped September 4, 1991 and November 17, 1993, were ever signed/authorized by Ms. Danford. See the bench's recognition of such error at TRII 17 (1-9): "And also a proposed report on a proposed adoption signed by Nadine Danford, unsigned report that's file-stamped February - I'm sorry September 4, 1991 in this Court." Emphasis by Robert. The non-signing of Natalie's reports, for whatever reason(s), constitutes error. Accordingly, at least as to Natalie, the adoption granted on May 10, 1995 should be reversed/negated. *Greer, supra, Kessler, supra, Kuhlman, supra, Lehr, supra, McClain, supra, Murray, supra* and *Smith, supra.*

Additionally, the investigator never attempted to interview Robert, as the biological father, although he was readily available for such contribution, by and through his counsel of record. Nor was any "identifying data" about him as the biological father included in the investigator's report, as required by 3107.12(C)(3). (Obviously, if the adoption is vacated the correctness of the original documentation is moot as to Andrew, who became emancipated on September 30,

1995).

Robert maintains such omissions violate his constitutional and procedural rights to protect his legal parenthood. To allow a probate court to award permanent custody of a child to a nonparent without a determination that the parent has relinquished custody or that such parent is unsuitable is an unconstitutional infringement of the parent's fundamental interest in the custody of his child(ren). *In re Adoption of Mays* (1986), 30 App.(3d) 195. *Quillion, supra, Stanley v. Illinois, supra, La Fleur, supra, Kessler, supra and Kuhlman, supra.*

The district court cites the fact that Robert's counsel did not object to the admission of the exhibit as a waiver of defect. Such exhibit was offered by opposing counsel directly to the bench: it was not until the unsealing of the probate records that Robert's counsel learned of such signatory defect, and her agreement to "the Court taking judicial notice" of such exhibit does not constitute a waiver of any statutory defect therein.

IX. The county probate bench erred as a matter of law and abused its discretion when it granted the adoption of Robert's children in contravention of O.R.C. 3107.14(A)

O.R.C. 3107.14(A) mandates: "The Robert and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown." Emphasis by Robert. Neither Andrew nor Natalie were present at the May 10, 1995 final adoption hearing. Nor had the Court excused either for good cause.

The following testimony was elicited by Robert's

counsel upon cross-examination:

> "Q. 'Are the children here to testify themselves, Mr. Celestino?'
>
> "A. 'No, they're not, because they're in school, which is an importance.'
>
> "Q. 'To your knowledge, did you request a waiver of their appearance here today?'
>
> "A. 'I would probably leave that up to my attorney, if he felt that was necessary.'
>
> "Q. 'And so to your knowledge one does not exist at the moment?'
>
> "A. 'To my knowledge, no.'"

TRII 11 (7-18).

Because Robert's counsel was not notified of the ex-parte, and later, "resumption" of an additional final adoption hearing, she cannot categorically state that neither of the two adoptees were then present, but the Court record does not so indicate - nor, in light of Mr. Celestino's earlier testimony, does it seem likely that the children were retrieved from school and hustled back to the courtroom for that later ex-parte adoption proceedings. Even if they had been, the ex-parte "resumption" itself was wholly invalid. See counsel for Robert's own hand-copied, and reproduced, transcription of TR20 (1-24), 21 (1-8) at AXXXVII. The district court's remand back for service (Case No. L-95-367) cannot, and does not alleviate or correct that original omission.

This specific violation alone nullifies the adoption granted on May 10, 1995 and, when combined with all of the other violations of Robert's constitutional, procedural and related statutory rights (#I through VIII above) substantiates a vacation of the subject adoptions. *Quillion, supra, La Fleur, supra, Stanley v. Illinois, supra, Yoder, supra, Meyer, supra, Greer, supra, Jorgensen, supra, Kessler, supra, Knipper, supra, Kuhlman, supra, Lehr, supra, Mays, supra, McClain, supra, Murray, supra,* and *Smith, supra.*

Despite Robert's counsel exact recitation of the transcribed notice of an O.R.C. 3107.14(A) violation to the court, on the record, the district court states that his counsel did not "raise the issue before the trial court". The appellate court again failed to comment on the lower court's failure to abide by a statutory mandate.

X. The county probate bench erred as a matter of law, erred procedurally and abused its discretion when it denied all of Robert's requests for findings of facts and conclusions of law

Ohio Rules of Civil Procedure 52 states:

"When questions of fact are tried by the Court without a jury, judgment may be general for the prevailing party unless one of the parties in writing or orally in open court requests otherwise before the journal entry of a final order, judgment or decree has been approved by the court for journalization, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions

of fact found separately from the conclusion of law***

"Findings of fact and conclusion of law required by this rule and Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56."

Emphasis by Robert. Rule 41(B)(2), applicable only to dismissals of a non-jury action, Rule 12, applicable only to defenses and pleadings by opposing parties and Rule 55, applicable only to default judgments, do not apply. Robert made no requests for findings of fact and conclusions of law under any of those circumstances.

Moreover, Rule 56, as applied to motions for summary judgment, specifically mandates:

"If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence ***, and ***, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The Court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just."

Emphasis by Robert. On January 24, 1995, Robert requested findings of fact and conclusions of law for motion hearing held on January 18, 1995. None were issued, in contravention of

Rule 52. On April 19, 1995, Father's Motion For Summary Judgment And His Memorandum In Support Thereof, was filed. On April 24, 1995, court merely found that "After due consideration, said Motion is hereby denied." As no facts or conclusions were delineated, the probate bench did not comply with Civil Rule 56, i.e., "specifying the facts that are without controversy, including the extent...to which relief is not in controversy." On April 28, 1995, Father's Request For Findings Of Fact And Conclusions Of Law was filed. None were issued.

On November 7, 1995, Robert filed his Father's Request For Findings Of Fact And Conclusions Of Law on the newly discovered May 10, 1995 final adoption orders, which was denied by Judgment Entry, file-stamped November 8, 1995, i.e., "Pursuant to Rule 52, ORCP, said request is hereby denied." Indeed, Rule 52 demands the issuance of findings of fact and conclusions of law "when questions of fact are tried by the court without a jury" and when one of the parties so requests in writing "not later than seven days after the party filing the request has been given notice of the Court's announcement of its decision." On October 5, 1995, Robert had his first notice that the contested May 10, 1995 journalized entries had been effectuated. His resultant Father's Motion For Full Vacation Of Prior Judgment Entry And Oral Orders As Moot, file-stamped November 1, 1995, specifically pertains to, and incorporates, such previously buried notice of the May 10th hearing and its ensuing "final" Orders.

The probate bench's continuing refusal to issue any findings of fact or conclusions of law was an unsubstantiated denial of Robert's due process and procedural rights to such renderings. See also all of the recorded argument thereon between the probate bench and counsel for Robert during the May 2, 1995 consent hearing, Transcript Of Proceedings, May

2, 1995 (hereinafter referred to as TRI) at pages 3, 10 and 17.

Oddly, the district court cites, and emphasizes, that part of Civil Rule 52 which validates Robert's arguments. His requests for findings of facts and conclusions of law were made immediately following at least two (2) situations wherein "questions of fact were tried by the court without a jury". Yet the Ohio appellate court holds that those "two other motions [were] not covered by Civil Rule 52", and makes no findings as to the bench's refusal to support its denial of summary judgment.

XI. The county probate bench abused its discretion and violated Robert's constitutional, statutory and procedural rights to due process when it refused to recuse itself

On September 20, 1991, by letter to the Supreme Court of Ohio, the probate bench recused itself from the first, and duplicative, adoption proceedings, stating: "as one of the parties in this case is the daughter of our County Prosecutor therefore, I have recused myself." *Celestino v. Schneider, supra.* See full text of that letter at AL-

On October 26, 1993, Robert filed his Father's Motion For Vacation Of Prior Entry For Failure Of Recusal, citing the aforecited September 20, 1991 letter, arguing that Camille was "still 'the daughter of our County Prosecutor'". Because such motion was heard together with, and consolidated as a part of, Robert's other three (3) then pending motions, one (1) of which prevailed and caused the vacation of the October 4, 1993 Entry Finding [Robert's] Consent Not Necessary, it was held to be moot by the probate bench's November 23, 1993 Judgment Entry.

On January 13, 1994, Robert filed his ensuing Motion For Recusal, again citing the bench's prior September 20, 1991 letter and iterating the fact that "Camille Alexis (Pizza/Schneider) Celestino is still 'the daughter of our County Prosecutor', and all parties are the same as in Case No. AD91-0098." By Judgment Entry issued eleven months later, the probate bench ordered hearing on that motion, and Robert's other pending motion, to be heard on January 18, 1995. On that same date, a Judgment Entry was issued finding such subject motion not well-taken. The probate bench made no response to Robert's Request For Findings Of Fact And Conclusions Of Law thereon, file-stamped January 24, 1995.

Consequently, Robert filed his Affidavit Of Disqualification Of Judge with the Supreme Court of Ohio on January 30, 1995. On February 14, 1995, that Court denied such Affidavit, solely on the basis that the matter had been pending before Judge Puffenberger for more than two years, he had made several rulings and Robert did not file his Affidavit until four days before a scheduled hearing. On February 24, 1995, Robert filed his Motion For Reconsideration And Memorandum In Support Thereof with the Ohio Supreme Court, arguing: 1.) That he had filed his very first motion concerning recusal on October 26, 1993, almost immediately after he learned that adoption proceedings had been reinstituted; 2.) That Judge Puffenberger had rendered no actual prior rulings except the contested January 18, 1995 denial of his January 13th Motion For Recusal and 3.) That until January 18, 1995, no actual hearing was ever held on the issue of the Judge's recusal.

Robert's Motion For Reconsideration was denied on March 1, 1995. Thereafter, the county probate bench committed all but one of its abuses of discretion and contraventions and/or circumventions of Robert's constitutional,

statutory and/or procedural rights. (See #I through #IX above). The single exception (#X) was only partially effectuated after March 1, 1995. Robert did file his initial and the second motions for recusal on October 26, 1993, and on January 13, 1994, respectively, well before the probate bench ever ordered a hearing thereon-for some eleven months later. Furthermore, the trial court made no ruling on such later motion for recusal until January 18, 1995, just twelve (12) days before Robert filed his Affidavit of Disqualification with the Supreme Court of Ohio.

Because of the egregious manner in which the county bench abused its discretion and contravened and/or circumvented Robert's constitutional, statutory and procedural rights after March 1, 1995, its refusal to recuse itself caused, and severely violated, all of Robert's rights to federal and state due process. Constitution of The United States, Fourteenth Amendment, Constitution of the State of Ohio, Bill of Rights #16, *Quilloin, supra, La Fleur, supra, Stanley v. Illinois, supra, Yoder, supra, Meyer, supra, Greer, supra, Jorgensen, supra, Kessler, supra, Knipper, supra, Kuhlman, supra, Lehr, supra, Mays, supra, McClain, supra, Murray, supra and Smith, supra.*

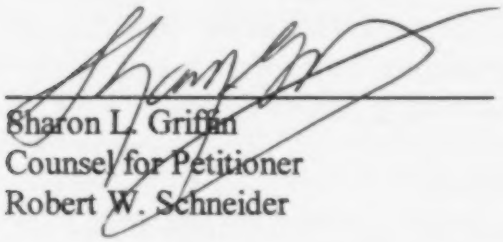
XII. <u>All of the foregoing violations of Ohio statutory and procedural law constitute a cumulative violation of Robert's right to federal and state due process</u>

The Fourteenth Amendment to the Constitution of the United States guarantees that "due process of law is required", as does the Constitution of the State of Ohio, Bill of Rights #16. The trial and appellate court's violation of I through XI above, and the Supreme Court of Ohio's rubber-stamp condonation, most certainly, and callously denied Robert his constitutional, statutory and procedural rights as a citizen/father.

CONCLUSION

This petition should be granted for any and/or all of the federal and state constitutional, statutory and procedural reasons argued above.

Respectfully submitted,



Sharon L. Griffin
Counsel for Petitioner
Robert W. Schneider

APPENDIX

FILED October 15, 1997

The Supreme Court of Ohio

1997 TERM

In the Matter of:	:	
Andrew C. and Natalie C.	:	Case No. 97-1505
	:	E N T R Y
[Robert S., Appellant.],	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Sharon L. Griffin.

(Lucas County Court of Appeals; No. L96373)

/s/Thomas J. Moyer
THOMAS J. MOYER

AI

Chief Justice

0019r101597 AI

IN THE COURT OF APPEALS OF LUCAS COUNTY

In the matter of:	Court of Appeals No. L-96-373
Andrew C. and Natalie C. AD92-0241	Trial Court No.
Robert S.	OPINION AND JUDGMENT ENTRY
Appellant	Decided: June 6, 1997

* * * * *

Sharon L. Griffin, for appellant.

* * * * *

KNEPPER, J. This is an appeal from judgments of the Lucas County Court of Common Pleas, Probate Division, which found that the consent of appellant Robert S. was not necessary for the adoption of his two children by his

former wife's new husband, and which finalized the adoptions. For the reasons that follow, this court affirms the judgment of the trial court as to both adoptions.

Appellant sets forth the following assignments of error:

> "ASSIGNMENT OF ERROR #1: THE PROBATE BENCH ERRED AS A MATTER OF LAW; ABUSED ITS DISCRETION AND DENIED APPELLANT HIS CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS TO AN APPEAL WHEN IT FAILED TO SERVE APPELLANT WITH THE ORDERS GRANTING THE CONTESTED ADOPTION OF HIS CHILDREN
>
> ASSIGNMENT OF ERROR #2: THE APPELLATE COURT ERRED AS A MATTER OF LAW; ABUSED ITS DISCRETION AND DENIED APPELLANT HIS CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS WHEN IT MERELY REMANDED THE ORIGINAL ISSUE OF SERVICE BACK TO THE PROBATE BENCH
>
> ASSIGNMENT OF ERROR #3: THE PROBATE BENCH ERRED AS A

MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' ADOPTION OF APPELLANT'S CHILDREN IN VIOLATION OF MANDATORY LOCAL COURT RULES

ASSIGNMENT OF ERROR #4: THE PROBATE BENCH ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' ADOPTION OF APPELLANT'S CHILDREN IN CONTRAVENTION OF O.R.C. 3107.12(F)

ASSIGNMENT OF ERROR #5: THE PROBATE BENCH ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT ATTEMPTED TO CIRCUMVENT O.R.C. 3107.16(B)

ASSIGNMENT OF ERROR #6: THE PROBATE BENCH ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' ADOPTION OF APPELLANT'S CHILDREN IN CONTRAVENTION OF O.R.C. 3107.11(A)(2) AND (3)

ASSIGNMENT OF ERROR #7: THE PROBATE BENCH'S EX-PARTE CIRCUMVENTION OF O.R.C. 3107.11(A) VIOLATED APPELLANT'S CONSTITUTIONAL, STATUTORY AND PROCEDURAL

RIGHTS TO CONTEST THE ADOPTION OF HIS CHILDREN

ASSIGNMENT OF ERROR #8: THE PROBATE BENCH ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' ADOPTION OF APPELLANT'S CHILDREN IN CONTRAVENTION OF O.R.C. 3107.12

ASSIGNMENT OF ERROR #9: THE PROBATE BENCH ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' ADOPTION OF APPELLANT'S CHILDREN IN CONTRAVENTION OF O.R.C. 3107.14(A)

ASSIGNMENT OF ERROR #10: THE PROBATE BENCH ERRED AS A MATTER OF LAW, ERRED PROCEDURALLY AND ABUSED ITS DISCRETION WHEN IT DENIED ALL OF APPELLANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

ASSIGNMENT OF ERROR #11: THE PROBATE BENCH ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS TO DUE PROCESS WHEN IT REFUSED TO RECUSE ITSELF

The facts that are relevant to the issues raised on appeal are as follows: Camile P. and appellant were married in 1976 and had two children: Andrew, born in 1977, and Natalie born in 1979. Camile and appellant divorced in 1988 and in 1991, Camile married David C.

On June 19, 1991, Camile and David filed a petition for adoption of Andrew and Natalie in the Lucas County Court of Common Pleas, Probate Division. The trial court found that appellant's consent was not necessary for the adoption because he had failed to provide support and maintenance for at least one year before the petition was filed. The adoption was eventually granted and appellant appealed. On December 11, 1992, this court reversed,

finding that the one $36 payment appellant had made was, in fact, child support and was sufficient to require his consent to the adoption.

On December 14, 1992, Camile and David filed a second petition for adoption of Andrew and Natalie. On October 4, 1993, the court entered judgment find that appellant's consent was not necessary for the adoptions because he had failed to provide support and maintenance for his children for at least one year prior to the filing of the petition. On November 24, 1993, that judgment was vacated upon appellant's motion and the court's finding that he had not been properly served with notice of the consent hearing. On May 2, 1995, the trial

court held a new hearing on the question of consent but did not issue a ruling at decision of the trial court but remanded the case "for service by the clerk of notice of the May 10, 1995 judgments as required by Civ.R. 56(B)."

On October 23, 1996, the trial court served appellant's attorney with copies of the May 10, 1995 judgments and appellant filed a timely notice of appeal of those judgments. There was no brief filed in this court on behalf of Andrew C. and Natalie C.

In his first assignment of error, appellant asserts that the trial court's failure to serve him with notice of the May 10, 1995 orders resulted in the denial of his constitutional, statutory and procedural rights to an appeal of

those orders, despite this court's October 11, 1996 remand to the trial court for service. Appellant asserts further that the remand cannot "erase" the trial court's error and that the trial court's orders granting the adoption should be vacated.

As to appellant's claim that he was prejudiced by the failure of service in 1995, this argument is moot in light of our subsequent remand for service of notice. While appellant was prevented from filing an appeal within thirty days of the orders, the remand ensured that he did in fact have the opportunity to appeal, with his thirty days beginning to run from October 23, 1996, the date his attorney was served with copies of the orders. We therefore find that

appellant was not prejudiced by the failure of service in May 1995, and his first assignment of error is not well-taken.

In his second assignment or error, appellant asserts that this court abused its discretion by remanding the case to the trial court for service. This argument could have been made in the form of an application for reconsideration filed after our October 11, 1996 decision and is not now properly before the court. Accordingly, appellant's second assignment of error is not well-taken.

Appellant's third and fourth assignments of error both concern payment of court costs associated with the adoptions and will be considered

together. In his third assignment of error, appellant asserts that the trial court violated local court rules when it granted the adoptions. In support of his argument, appellant cites Loc.R. 25.1 of the Court of Common Pleas of Lucas County Probate Division, and "Local [probate court] Rule #17.3."

This court notes that there is currently no Rule 17.3 in the Lucas County Probate Court Rules of Practice, nor is there any rule which comes close to that which appellant cites, either in number or content. The copy of the rule attached to appellant's brief gives no indication as to the effective date of the rule, nor is there a heading to indicate that the rule is indeed an excerpt from the Lucas County Local

Probate Rules. In fact, a close reading of "Rule 17 - Court Costs" as provided by appellant indicates that it is a domestic relations rule which deals with costs associated with divorce, dissolution, legal separation and annulment.

As to Loc.R. 25.1, also cited in support of his third assignment of error, appellant argues that the rule states that "[n]o adoption shall be finalized until court costs are paid in full." Appellant then admits that he "has had no access to the probate court's cost department records. Despite that admission, however, appellant states that "it seems apparent" that court costs were never paid by appellees prior to the orders

granting the adoptions.

In his fourth assignment of error, appellant asserts that the trial court's orders granting the adoptions violated R.C. 3107.12(F), which states that "[u]pon order of the court, the costs of the investigation and other proceedings shall be paid by the petitioner***." Appellant states that it "can be deduced" by his arguments in support of Assignment of Error No. 3 that appellees did not pay any of the costs. As appellant acknowledged, however, he "has had no access to the probate court's cost department records."

Upon thorough consideration of the entire record of proceedings in the trial court, this court finds no evidence to support appellant's claim

that trial court costs were never paid. Accordingly, appellant's third and fourth assignments of error are not well-taken.

In his fifth assignment of error, appellant asserts that the trial court tried to circumvent R.C. 3107.16(B) by "burying" the May 10, 1995 final orders. Appellant asserts that he did not discover this attempt to "bury" the orders until five months after they were signed and that if he had not made the discovery, in another seven months he would have lost his right to an appeal under R.C. 3107.16(B).

Upon consideration of the record in this case, this court finds that appellant obviously did not lose his right to appeal these adoptions and that

his argument is therefore moot. Accordingly, appellant's fifth assignment of error is not well-taken.

In his sixth assignment of error, appellant asserts that the trial court erred by failing to give him twenty days notice of the best interest hearing, as required by R.C. 3107.11(A), when it set the May 10, 1995 hearing date on May 2.

R.C. 3107.11 provides in relevant part:

> "(A) After the filing of a petition to adopt an adult or a minor, the court shall fix a time and place for hearing the petition. the hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner. At least twenty days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following:

"***

"(2) Any court, agency, or person whose consent to the adoption is required by this chapter but who has not consented;

"(3) A person whose consent is dispensed with upon any ground mentioned in divisions (A), (E), (F), and (G) of section 3107.07 of the Revised Code, but who has not consented."

An examination of the transcript of the May 2, 1995 consent hearing shows that appellant's counsel was present and participated in the scheduling of the May 10 proceedings. The trial court asked appellant's counsel when she was available in the coming two weeks and she indicated that she was available on the afternoon of May 10. The following exchange then took place:

"THE COURT: Very well. We'll set this matter for best

interest hearing at 2:00 on May 10th, in this courtroom, all parties are notified by virtue of this statement in open court, you are notified that this case will be heard May 10th, 2:00 as to the best interest hearing. We'll proceed on that date and time. Anything further Mr. McCrory?

"MR. MCCRORY: Nothing further.

"THE COURT: Anything further, Ms. Griffin?

"MS. GRIFFIN: No, sir."

Upon consideration of the foregoing, this court finds that appellant clearly had notice of the May 10, 1995 hearing.

Appellant also refers to an "ex-parte ('resumption of') hearing later on May 10, 1995" as having been conducted without notice to appellant or his counsel. An examination of the transcript of the May 10 hearing shows

that at the conclusion of the testimony and final arguments, the trial court rules that the adoptions were in the best interest of the children. the following dialog then took place:

> "THE COURT: ***Anything further at this time, Ms. Griffin?
>
> "MS. GRIFFIN: No, sir.
>
> "THE COURT: Mr. McCrory?
>
> "THE COURT: We'll recess this best interest hearing at this time and proceed to finalization."

When court resumed after the recess, the judge noted that "Ms. Griffin has departed" and then stated that "*** the Court Reporter will be excused and the Court will proceed to the execution of the proper documents with the parties." Apparently, that is what appellant refers to as an "ex-parte

('resumption of') hearing." At that time, the court had ruled on the petitions for adoption in the presence of the parties and their counsel. There is nothing in the record to indicate that any proceedings subsequently were conducted outside the presence of appellant's counsel other than signing of the finalization documents. We therefore find that there was no "ex-parte ('resumption of') hearing" as appellant claims.

Generally, in order for a party to assert an error on appeal, the claimed error must first have properly been called to the trial court's attention, either by pleading, motion, objection or otherwise. See, e.c., State v. Williams (1977), 51 Ohio St.2d 112, paragraph one

of the syllabus; State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 192.

Based on the foregoing, this court finds that, while appellant did not receive twenty days notice of the hearing, counsel did not object to the May 10 date or otherwise call the matter to the court's attention. Accordingly, appellant's sixth assignment of error is not well-taken.

In his seventh assignment of error, appellant asserts that the trial court's request from the Ohio Department of Human Services for a waiver of the requirement set forth in R.C. 3107.11(A) that the department by given twenty days notice of the best interest hearing violated his right to contest the adoption of his children. As we stated

above in our response to Assignment of Error No. 6, appellant's counsel clearly agreed to the May 10 hearing date, despite its being only eight days away, and had the same notice as did petitioners and their counsel. Appellant's counsel was present for the May 10 hearing. Further, the October 11, 1996 remand ensured that appellant was not deprived of his right to contest the adoptions. Accordingly, we find that the waiver of twenty days notice of the hearing did not violate appellant's right to contest the adoption of his children and appellant's seventh assignment of error is not well-taken.

In his eighth assignment of error, appellant asserts that because neither of the two written reports on Natalie C.

were signed by the investigator, the trial court committed error when it granted the adoptions. Appellant argues that the unsigned reports did not constitute actual validation under R.C. 3107.12, which requires that an investigation be made for the purpose of ascertaining whether the adoptive home is suitable for the minor and whether the adoption is in the child's best interest.

The transcript of the May 10, 1995 hearing shows that at the close of the petitioners' case, their counsel moved to have the investigator's reports marked and admitted into evidence. The evidence consisted of a report for each child made in 1991 after the first petition for adoption was filed, and

supplemental reports completed after the second petition was filed in 1993. The record shows that the following dialog took place in reference to the reports:

> "MR. MCCRORY: Could we then mark that as an exhibit?
>
> "MS. GRIFFIN: I have no objection to that. I have no objection to the Court taking judicial notice of it. It is a record of the court. I have no objection, however you do it.
>
> "***
>
> "MS. GRIFFIN. Again, I have no objection to the entry of such exhibit that's already a matter of the court record.
>
> "THE COURT: Well, you have no objection to the admissibility of that exhibit?
>
> "MS. GRIFFIN: No, sir."

Based on the foregoing, this court finds that appellant failed to object to any claimed defect in the reports or

otherwise call that matter to the court's attention pursuant to Williams, supra, and his eighth assignment of error is not well-taken.

In his ninth assignment of error, appellant asserts that the trial court granted the adoptions "in contravention of R.C. 3107.14(A)" because Andrew and Natalie were not present at the May 10 hearing and the court had not excused them.

R.C. 3107.14(A) states:

> "The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown."

In State v. Williams, supra at paragraph one of the syllabus, the Supreme Court of Ohio held that an appellate court need not consider an

error which a complaining party could have called but did not call to the trial court's attention at a time when the error could have been avoided or corrected by that court. The record indicates that appellant's counsel did not object to the children's absence or raise the issue before the trial court. Upon consideration thereof, this court finds appellant's ninth assignment of error not well-taken.

In his tenth assignment of error, appellant asserts that the trial court erred by denying his three requests for findings of fact and conclusions of law. Appellant argues that findings of fact and conclusions of law were required in each instance pursuant to Div.R. 52.

Civ.R. 52 clearly states that

findings of fact and conclusions of law "are unnecessary upon all other motions including those pursuant to *** Rule 56." Appellant's requests were made upon one motion for summary judgment pursuant to Civ.R. 56 and two other motions not covered by Civ.R. 52. Upon consideration thereof, this court finds that the trial court did not err by denying the appellant's requests for findings of fact and conclusions of law and appellant's tenth assignment of error is not well-taken.

In his eleventh assignment of error, appellant asserts that the trial judge erred by not recusing himself from this proceeding. Appellant appears to argue that the judge should have disqualified himself following

appellant's January 13, 1994 motion for recusal because the judge had recused himself in September of 1991, during the pendency of the first adoption proceeding. Appellant cites the judge's September 20, 1991 letter to the Supreme Court of Ohio in which he stated that "as one of the parties in this case is the daughter of our County Prosecutor***, I have recused myself." The trial court found appellant's motion not well-taken on January 18, 1995, and on January 30, 1995, appellant filed an "Affidavit of Disqualification of Judge' with the Supreme Court of Ohio. On February 14, 1995, the Supreme Court denied appellant's affidavit on the basis that the matter had been pending before the judge for more than two

years, during which time he had made several rulings, and because appellant did not file his affidavit until four days before a scheduled hearing, despite being aware of the existence of grounds for disqualification prior to that time.

RECEIVED OCTOBER 19, 1997

IN THE SUPREME COURT OF OHIO

In the Matter of: Andrew C. and Natalie C.	*	Case No. 97-1505
[Robert S., Appellant.]	*	APPELLANT'S MOTION FOR RECONSIDERATION

***

Now comes the Appellant, Robert W. Schneider, by and through his counsel, to most respectfully request a reconsideration/rehearing of this instant case. Appellant so moves because by Entry, file-stamped October 15, 1997, this Court declined jurisdiction to hear this case, and dismissed the appeal "as not involving any substantial constitutional question."

Indeed, Appellant incredulously

queries how this august adjudicator maintains that his appeal does not involve "any substantial constitutional question", when both trial and appellate court records below, as well as his Appellant's Memorandum In Support Of Jurisdiction, file-stamped July 21, 1997, clearly delineate that the trial court blatantly denied Appellant his statutory and/or procedural rights to due process, under both the federal and state constitutions. The probate bench violated O.R.C. 3107.11(A)(3); O.R.C. 3107.16(A); O.R.C. 3107.12(F); O.R.C. 3107.16(B); O.R.C. 3107.11(A)(2)(3); O.R.C. 14(A); Ohio Rules of Civil Procedure 52, as well as its own Local Probate Court Rule 25.1. (See again Appellant's arguments in his

Propositions of Law I through VII, pages 4 - 14, of Appellant's aforecited Memorandum.) The appellate bench endorsed the lower court's denial/circumvention of all of Appellant's statutory and procedural rights to due process when it misapplied Appellate rule 4(A) to remand. See again Appellant's Proposition Of Law I, at page 4 - 5.

Furthermore, the lower courts rendered such violative decisions in direct conflict with at least ten (10) controlling appellate and/or Supreme Court cases. See again page 3 of Appellant's subject Memorandum, as well as all of his Propositions Of Law I through VIII.

And this Court now summarily

dismisses that statutory rape of Appellant's constitutional rights under both the Fourteenth Amendment and the Ohio Bill of Rights, #16 "as not involving any substantial constitutional question". What is more "substantial" than Mr. Schneider's illegal loss of his two children?

WHEREFORE, Appellant moves this Court to re-examine and reconsider/rehear his Appellant's Memorandum In Support Of Jurisdiction, file-stamped July 21, 1997.

Respectfully submitted,

Sharon L. Griffin
Counsel for Appellant
520 Madison Avenue
Suite 837
Toledo, Ohio 43604
(419) 255-8111

SC #0017629

CERTIFICATION

This is to certify that a copy of the foregoing Appellant's Motion For Reconsideration was served on the day of filing hereof on Paul A. McCrory, Jr., lower court Counsel for Appellees, 3601 West Alexis Road, Suite 102, Toledo, Ohio 43623 by ordinary U.S. mail.

Sharon L. Griffin
Counsel for Appellant
Robert W. Schneider

Rule 25.1
COURT COSTS

A. Deposits in the amounts set forth below shall be required in the following actions and proceedings, including those where the fiduciary is bonded:

Estate (full administration).....$125.99

Estate (wrongful death only...60.00

Rules of Practice, Court of Common Pleas

Guardianship of Estate...90.00

Guardianship of Person (Incompetent).....165.00

Guardianship of minor (home study required).....290.00

Testamentary trusts.....65.00

Land Sale Complaints.....75.00

Adoptions: Independent and Relative

(eff. 1-23-92).....150.00

Step-parent (eff. 1-23-92).....250.00

Agency.....54.00

Each additional child (eff. 1-23-92).....15.00

Home study ordered by Court.....200.00

No adoption shall be finalized until court costs are paid in full.

The deposit shall be applied from time to time as filings occur and additional deposit may be required by the Court if necessary.

B. Payment in full shall be required time of filing for reliefs from administration, minor settlements with no appointments, applications to probate will only, changes of name, guardianship of person only, and other miscellaneous actions.

C. For the purpose of procuring and maintaining computerized legal research services, an additional fee of Three Dollars ($3.00) may be collected as costs in each cause filed in an estate, wrongful death, guardianships, trust, minor settlement, civil action, correction of birth record, registration of birth, change of name or adoption. (eff. 1-1-93).

D. The Clerk of the Probate Court may charge an additional fee of up to $10.00 in each cause filed in an estate, wrongful death, guardianship, trust, minor settlement, civil action, correction of birth record, registration of birth, change of name, adoption or marriage license for the purposes of court computerization pursuant to H.B. 405. (eff. 1-1-93).

E. The Clerk of the Probate Court may retain up to $10.00 of every case where costs are paid in an estate, wrongful death, guardianship trust, minor settlement, civil action, correction of birth record, registration of birth, change of name or adoption for the purpose of procuring and maintaining microfiche records.

F. The Clerk of the Probate Court may charge a fee of up to $20.00 for each of the following returns when it is filed in the Probate Court (eff. 5-1-93):

a) Resident Ohio Estate Tax Return (E.T. Form 2).

b) Nontaxable Return (E.T. Form 1-B)

c) Nonresident Estate Tax Return (E.T. Form 4)

(Proceedings Concluded)

THE COURT: "This is case number AD92-0241. This is a matter of the adoption of Andrew Robert Celestino and Natalie Susanne Celestino. This matter was before the Court earlier this afternoon. At that time, the Court made a couple of findings as to the - -as to the issue of whether or not this adoption is in the best interest of the children. Those entries have been file-stamped and made a part of the record. The record should reflect that at this time we have resumed this matter. Attorney Griffin has departed and it would be the court's intention at this time to proceed with finalization of these adoptions.

"I would indicate that on May 4th,

the Court faxed to the Ohio Department of Human Services a request for waiver of the 20 day notice, filing of the petition and the time and place of hearing of the adoption. And on May 9th, the Court received a fax from Mary Jane Frank, Acting Chief of the Adoption Department, that the waiver had been granted. We are therefore, in a position to finalize this adoption at this time, even though the State has not been given the 20 day notice, in that the State has consented to waiver of the 20 day notice.

The Court, at this time, will proceed to review the paperwork, the consents that need to be signed and other related documents that need to be filed to finalize this adoption.

"At this time the court Reporter will be excused and the Court will proceed to the execution of the proper documents with the parties."

LUCAS COUNTY COMMON PLEAS COURT

PROBATE DIVISION

700 ADAMS STREET
TOLEDO, OHIO 43624

FACSIMILE 245-4764
TELEPHONE 245-4775

JACK R. PUFFENBERGER
JUDGE

CHARLES P. SHAFFER
CHIEF DEPUTY/ADMINISTRATION

SUSAN E. FREDERICK
CHIEF REFEREE

October 31, 1995

Sharon L. Griffin, Esq.
The Gardner Building
500 Madison Ave., Ste. 540
Toledo, Ohio 43604

Re: Cases AD91-0098
AD92-0241

Dear Ms. Griffin,

The Cost Department has figured the costs on the above cases. I have been informed that the total court costs incurred by your client is $324.80.

AXL

Please remit this amount to the Lucas County Probate court as soon as possible. Thank you for your prompt attention regarding this matter.

Sincerely,

/s/Jack R. Puffenberger
Jack R. Puffenberger,
Probate Judge

Sharon L. Griffin
ATTORNEY AT LAW
(419) 255-8111

November 13, 1995

Ms. Paula Finnegan
Supervisor
Cost Department
Court of Common Pleas of
Lucas County, Ohio
Probate Division
Lucas County Courthouse
700 Adams Street
Toledo, Ohio 43624

Re: In The Matter Of The Adoption Of Andrew Robert and Natalie Susanne Celestino - Case No.'s AD91-0098/AD92-0241

Dear Ms. Finnegan:

Attached hereto please find copy of October 31st letter from Judge Puffenberger to me. Although, in all the years I have practiced law, I have never before received a personal dunning letter from a Judge, please review the above-cited cases and advise how and why these costs are so belatedly being brought to our attention, since Probate Rule #17(3), states that:

"When the judgment entry does not state which party is to pay costs, then the party filing the cause is responsible for the payment of all costs." (emphasis by us).

Most particularly, Local Rule #25.1 specifically states that "No adoption shall be finalized until court costs are paid in full". Despite the fact that neither Mr. Schneider nor I, as his counsel of record, even received a copy of a requested May 10th Judgment Entry, issued by Judge Puffenberger, it is our understanding that such Entry did finalize the above-cited latter case.

Thank you.

Sincerely,

Sharon L. Griffin
Attorney at Law

Attachment (1)

cc: The Honorable Charles J. Donegy,
Administrative Judge
The Honorable Jack R. Puffenberger
Robert W. Schneider
SLG/ma

The Gardner Building * 500 Madison Ave. *
Suite 540 * Toledo, Ohio 43604

FILED May 10, 1997

PROBATE COURT OF LUCAS COUNTY, OHIO
IN THE MATTER OF THE ADOPTION OF Andrew Robert Celestino
Case No. AD92-0241 Docket_____

FINAL ORDER OF ADOPTION

(Without Interlocutory Order)

This day this matter came on to be heard on the petition of David Donald Celestino and Camile Alexis Celestino for the adoption and change of name of the child being adopted and the Court finds that notice thereof has been given to all the parties in interest; and that all consents have been filed herein or have been found unnecessary.

The Court further finds that the allegations in the petition are true; that the child has been placed in the home of the petitioner by mother, Camile Alexis Celestino and has been placed therein in accordance with the laws

relating to the placement of children; child has lived in the home of the petitioner continuously for the six months next preceding the date of the hearing; and has been visited by the investigator who has filed a report.

The Court finds that the petitioner is suitably qualified to care for and rear the child and that the best interest of he child will be promoted by the adoption. The Court finds further that petitioner filed herein his account for disbursements which report has been reviewed and has been approved.

It is therefore ordered that a final decree of adoption is entered herein.

It is therefore ordered that the name of said child is changed to Andrew

Robert Celestino the full name by which the child shall be known after adoption.

It is further ordered that a Certificate of Adoption, certified by the Court be forwarded to the State Department of Health, Division of Vital Statistics at Columbus, Ohio; further, that a copy of this decree be forwarded to the Ohio Department of Human Services for statistical purposes.

May 10, 1995
Date

/s/Jack R. Puffenberger
Probate Judge
Jack R. Puffenberger

18.7 FINAL ORDER OF ADOPTION
(Without Interlocutory Order)

JOURNALIZED 5-10-95

FILED MAY 10, 1995

PROBATE COURT OF LUCAS COUNTY, OHIO
IN THE MATTER OF THE ADOPTION OF Natalie Susanne Celestino
Case No. AD92-0241 Docket_____

FINAL ORDER OF ADOPTION

(Without Interlocutory Order)

This day this matter came on to be heard on the petition of David Donald Celestino and Camile Alexis Celestino for the adoption and change of name of the child being adopted and the Court finds that notice thereof has been given to all the parties in interest; and that all consents have been filed herein or have been found unnecessary.

The Court further finds that the allegations in the petition are true; that the child has been placed in the home of the petitioner by mother, Camile Alexis Celestino and has been placed therein in accordance with the laws

relating to the placement of children; child has lived in the home of the petitioner continuously for the six months next preceding the date of the hearing; and has been visited by the investigator who has filed a report.

The Court finds that the petitioner is suitably qualified to care for and rear the child and that the best interest of he child will be promoted by the adoption. The Court finds further that petitioner filed herein his account for disbursements which report has been reviewed and has been approved.

It is therefore ordered that a final decree of adoption is entered herein.

It is therefore ordered that the name of said child is changed to Natalie

Susanne Celestino the full name by which the child shall be known after adoption.

It is further ordered that a Certificate of Adoption, certified by the Court be forwarded to the State Department of Health, Division of Vital Statistics at Columbus, Ohio; further, that a copy of this decree be forwarded to the Ohio Department of Human Services for statistical purposes.

May 10, 1995 /s/Jack R. Puffenberger
Date Probate Judge
Jack R. Puffenberger

18.7 FINAL ORDER OF ADOPTION
(Without Interlocutory Order)

JOURNALIZED 5-10-95

LUCAS COUNTY COMMON PLEAS COURT
PROBATE DIVISION

700 ADAMS STREET
TOLEDO, OHIO 43624

FACSIMILE 245-4764
TELEPHONE 245-4775

September 20, 1991

Chief Justice Thomas J. Moyer
The Supreme Court of Ohio
30 East Broad St.
Columbus, Ohio 43266-0419

ATTN: Ruth Ann Elmer

Dear Chief Justice Moyer:

I respectfully request the assignment of retired Judge Francis C. Restivo to serve as visiting Judge of Lucas County Common Pleas court, Probate Division, in the following case:

In re: Adoption of Andrew Robert Celestino and Natalie Susanne Celestino, AD91-0098

This particular assignment is necessary as one of the parties in this case is the daughter of our County Prosecutor, therefore, I have recused myself. This has been scheduled on our

AL

docket for Monday, November 25, 1991 at 9:00 a.m.

Thank you very much for your consideration regarding this matter.

Sincerely,

/s/Jack R. Puffenberger
Jack R. Puffenberger
Judge, Probate Division

JRP/kk
cc: Judge Francis C. Restivo

Civ R 56

Summary judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion.

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding

BEST AVAI

the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable.

Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Adopted eff. 7-1-70; amended eff. 7-1-76

ABLE COPY

Civ R 60

Relief from judgment or order

(A) Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

Adopted eff. 7-1-70

BEST AVAIL

3107.11 Hearing and notice

(A) After the filing of a petition to adopt an adult or a minor, the court shall fix a time and place for hearing the petition. The hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner. At least twenty days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following:

(1) The department of human services;

(2) Any court, agency, or person whose consent to the adoption is required by this chapter but who has not consented;

(3) A person whose consent is dispensed with upon any ground mentioned in divisions (A), (E), (F), and (G) of section 3107.07 of the Revised Code, but who has not consented.

The notice to the department of human services shall be accompanied by a copy of the petition.

(B) All notices required under this section shall be given as specified in the Rules of Civil Procedure. Proof of the giving of notice shall be filed with the court before the petition is heard.

HISTORY: 1986 H 428, eff. 12-23-86
1978 H 832; 1976 H 156

ABLE COPY

3107.12 Investigation; report; costs; social and medical histories of biological parents; correction of history

(A) An investigation shall be made by the department of human services, an agency, or other person appointed by the court into the conditions and antecedents of a minor sought to be adopted and of the petitioner, for the purpose of ascertaining whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor. If the minor is in the custody of the department or an agency, the department or agency shall perform the investigation.

(B) A written report of the investigation as described in division (C) of this section shall be filed with the court at least ten days before the petition for adoption is heard.

(C) The report of the investigation shall contain, in addition to any other information that the court requires regarding the petitioner or the minor sought to be adopted, the following information:

(1) The physical and mental health, emotional stability, and personal integrity of the petitioner and the ability of the petitioner to provide for the needs of the minor;

(2) The physical, mental, and developmental condition of the minor;

(3) The minor's family background, including names and identifying data regarding the biological or other legal parents, and, except when the adoption is by a stepparent or grandparent, the social and medical histories described in division (D) of this section, to the extent that they can be prepared;

(4) The reasons for the minor's placement with persons other than his biological or other legal parents, their attitude toward the proposed adoption, and the circumstances under which the minor came to be placed in the home of the petitioner;

(5) The attitude of the minor toward the proposed adoption in any case in which the minor's age makes this feasible;

(6) The recommendation of the investigator as to the granting or denial of the petition for adoption.

(D)(1) The department of human services shall prescribe, and shall supply for purposes of an investigation pursuant to division (A) of this section, forms for the taking of the social and medical histories of the biological parents of minors sought to be adopted.

(2) Except when an adoption is by a stepparent or grandparent, the department, an agency, and any other person appointed by a court to make an investigation pursuant to division (A) of this section, to the extent possible, shall record the social and medical histories of the biological parents of the

3107.14 Court's discretion: final decree or interlocutory order

(A) The petitioner and the person sought to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.

(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted, it may issue, subject to division (D)(6) of section 3107.12 of the Revised Code and any other limitations specified in this chapter, a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.

In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition.

HISTORY: 1984 H 84, eff. 3-13-85
1976 H 156

O.R.C. 3107.16 Appeals; finality of decree

(B) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.